Nos. 21310, 21313, 21314

In the United States Court of Appeals for the Ninth Circuit

CALIFORNIA GAS PRODUCERS ASSOCIATION, INDEPENDENT OIL AND GAS PRODUCERS OF CALIFORNIA, JADE OIL AND GAS COMPANY; THE STATE OF TEXAS; TEXAS INDEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIATION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION, and PERMIAN BASIN PETROLEUM ASSOCIATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC GAS TRANSMISSION COMPANY; PUBLIC UTILITY COMMISSIONER OF OREGON; SOUTHERN CALIFORNIA GAS COMPANY, SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA and PACIFIC LIGHTING SERVICE AND SUPPLY COMPANY; CITY AND COUNTY OF SAN FRANCISCO, INTERVENORS

On Petitions to Review an Order of the Federal Power Commission

BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

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Federal Power Commission,
Washington, D. C. 20426.

January 30, 1967

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BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

STATEMENT OF JURISDICTION

These are proceedings to review an order of the Federal Power Commission issued June 15, 1966 (R. 5254-5263).[1] Petitioners' timely applications for rehearing (R. 5264-5277, 5278-5284, 5285-5313), filed on July 8, 11, and 12, 1966, were denied by order of August 4, 1966 (R. 5315-5316). The petitions for review were filed on September 29, October 1 and 3, 1966. Jurisdiction of this Court rests upon Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), *infra*, p. 34.

STATEMENT OF THE CASE

The Commission order challenged here authorized Pacific Gas Transmission Company (PGT), a natural gas pipeline, to import from Canada an additional 100,000 Mcf of natural gas per day commencing on or about November 1, 1966,[2] and a further 100,000 Mcf per day commencing on or about November 1, 1967, for transportation and sale to the Pacific Gas and Electric Company (PG&E) in California. The project will use the existing pipeline, with the addition of some new compressor facilities. The questions presented by the petitioners relate generally to the reasonableness of the Commission's findings with respect to, *inter alia*, the market for this gas, the adequacy of the underlying supply and the failure to show that the market could be supplied by alternative means at rates and conditions more in the public interest than the project approved. The basic position of petitioners is, and has been throughout these proceedings, that the import of additional supplies of Canadian gas is unnecessary on the ground that gas for the

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[1] Petitioners also state they are seeking review of the procedural order of December 17, 1965 (R. 4890-4893). While this order is not reviewable as such, the alleged procedural errors are properly before this Court to the extent they may inhere in the June 15, 1966, order under review.

[2] This importation has now commenced.

expanding California market can be furnished by California and/or Texas producers.

Background.—The project approved by the Commission in this case involved a fuller utilization of existing pipeline facilities authorized by the Commission on August 5, 1960. *Pacific Gas Transmission Co.*, 24 FPC 134. By that order, Pacific Gas Transmission was authorized to construct and operate a 614 mile 36-inch pipeline extending from the international border at Kingsgate, British Columbia, to the Oregon-California border. This pipeline was only one portion of about 1400 miles of 36-inch pipeline connecting vast gas-producing fields in the province of Alberta to the facilities of PG&E in northern California. The 1960 order authorized PGT to deliver an average of 415,000 Mcf of gas per day to PG&E and also to transport on a cost-of-service basis more than 100,000 Mcf per day for El Paso Natural Gas Company and its Canadian supplier from the border at Kingsgate to points of connection with El Paso's system in the Pacific Northwest. The cost of PGT's original facilities was $116,940,000 (R. 4903, 4908, 5257).[3]

In order to transport and sell the additional 200,000 Mcf of gas per day, PGT sought authority from the Commission to construct facilities, principally for additional compression, costing an estimated $13,857,000 (R. 2354, 4907).

As previously noted, Pacific Gas Transmission's pipeline is only part of a longer line originating in Alberta, where all the gas is produced and purchased. The gas is purchased from Canadian producers by Alberta and Southern Gas Co., Ltd., a wholly-owned subsidiary of PG&E. Alberta and Southern owns no transmission fa-

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[3] Though there was no opposition to the issuance of the 1960 certificate as such (disagreement existed as to the terms), the Commission order was issued after a full hearing which included participation, *inter alia*, by the regulatory authorities from the States of California, Idaho, Oregon and Washington, and the cities of Los Angeles and San Francisco, and a full decision by the Examiner. See 24 FPC 134.

cilities. Gas purchased by it is transported through Alberta to the British Columbia border by Alberta Gas Trunk Line Company Limited, which has no corporate connection with the other companies except that Alberta and Southern holds one share of its Class B Group II common shares. The original investment in Trunk Line's facilities prior to the present addition was $82,638,000. The additional investment required for the present project was estimated at $6,556,000 (R. 2879, 4906).

The gas is transported through British Columbia to Kingsgate at the international border by Alberta Natural Gas Company, two-thirds of whose common stock is owned by PGT. The additional compressor facilities needed to transport the 200,000 Mcf per day increment involved here will increase its undepreciated investment of $32,637,000, by about $5,400,000 (R. 2879, 4906-4907).

After Pacific Gas Transmission delivers the gas to PG&E at the California-Oregon border, PG&E transports it 298 miles to Antioch, California. This section of pipeline originally cost $54,250,000 and it was estimated that the additional compressor and metering facilities needed for the present project would cost an additional $5 million (R. 2879).

Hearings and Examiner's Decision.—During the hearings which started on September 15, 1965, and ended on September 29, 1965, evidence was presented by the applicant, as well as by opponents of the importation. In addition, certain evidence was excluded, including, *inter alia,* testimony and exhibits relating to the availability of Texas gas and means of transporting Texas gas via facilities that El Paso had indicated in another case it could construct. In each instance where the proffered prepared testimony was excluded, the sponsoring party made an offer of proof pursuant to Section 1.28(b) of the Commission's Rules of Practice and Procedure. The Commission, by order of December 17, 1965, refused to review the Examiner's exclusions on an interlocutory basis, pointing out that offers of proof had been made and that the excluded evidence "will be available for our con-

sideration when the case comes before us for decision. We are of the opinion that this is the proper way to handle the matter" (R. 4890-4893).

On February 17, 1966, the Examiner issued a decision recommending approval of PGT's application in the form requested (R. 4902-4929). After discussing the procedural history of the case and the nature of the applications, the Examiner found, *inter alia,* that the supporting gas supply was adequate (R. 4908-4910); that the recommended authorization should not be conditioned to require modification of the terms of the Canadian gas supply contracts (R. 4910-4915); that PGT's additional deliveries would decrease the costs of gas to both PG&E and the northwest portion of El Paso's system (R. 4916-4917); and that PG&E's market would require not only the additional deliveries proposed by PGT, but also all of the usable gas available from California producers (R. 4919-4923).

The Commission's Opinion.—Upon consideration of exceptions to the Examiner's decision by the present petitioners, who sought denial of the applications, and more limited exceptions by San Francisco, the California Public Utilities Commission, and the Commission's staff, the Commission, on June 15, 1966, issued its opinion and order granting the requested authorization (R. 5254-5263). The Commission concluded that while the supply requirements needed to support the more efficient utilization of essentially existing pipeline facilities were less stringent than those for a new pipeline, an adequate Canadian gas supply had been shown (R. 5259). In addition, it found that alternative methods for providing the needed volumes of additional gas at rates and under conditions more advantageous than those to be achieved by certification of PGT's application had not been shown to exist, and that, in these circumstances, the benefits which the additional PGT importation would give to consumers in four states (California, Washington, Oregon and Idaho) far exceeded any alleged detriment to the domestic petroleum industry or its exploration and development

program (R. 5259-5260). With respect to the market, the Commission found that the new gas from Canada, as well as any available California produced gas, could be absorbed by PG&E's market (R. 5260).

The Commission, rejecting the contentions that the application should be denied because Canadian supplies were unreliable since they could be cut off by the Canadian authorities, said "[w]e think that the close relationship between the United States and Canada renders it unlikely that this sort of difficulty will arise" (R. 5260). It added, in this respect, that the contention was particularly weak in a case such as this where the new gas is to be delivered through essentially existing pipeline facilities. *Ibid.* It also concluded that, in the circumstances of this case, the existence of indefinite price-changing provisions in many of the Canadian producer supply contracts, with a consequent possibility of unknown future price increases, did not warrant conditioning PGT's certificate on its attempt to renegotiate its existing supply contracts to eliminate such provisions.

After the denial of applications for rehearing (R. 5315-5316), the petitions for review followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The record in this case showed that PG&E has a present market need for the additional deliveries of gas from Canada that PGT has been authorized to make. In fact, the record made it clear that PG&E's future requirements will not even be satisfied by the additional supplies approved here. It may be noted in this connection applications have recently been filed with the Federal Power Commission requesting permission to sell an additional 200,000 Mcf per day to PG&E.[4] Whether or not these

[4] Pacific Gas Transmission proposes to sell an additional 200,000 Mcf. See *Pacific Gas Transmission Co.*, FPC Docket Nos. CP67-187 and CP67-188, applications filed December 23, 1966. These applications indicate that PG&E also expects to purchase an additional *firm* supply of 100,000 Mcf from El Paso.

additional applications will be approved, it is apparent that the present expansion is only part of a continuing increase of out-of-state deliveries required to meet the growing California gas market. Petitioners' claims that the Commission did not adequately consider unapplied-for alternative means of supplying the present market requirements of PG&E are not only inaccurate but should be judged in this context. We will show that petitioners' suggestions for supplying PG&E's present requirements sought to be supplied here plainly did not present viable alternative methods. Not only would the suggested supplies from El Paso have been more expensive, but, in view of the absence of any El Paso application to render such service deliveries, could not have started by November 1, 1966, the date on which PG&E sought to have its new supply delivered.

The Commission fully considered petitioners' contentions that the present supply should not have been certificated because of the possibility of increases, sometime in the future, of Canadian wellhead prices as a result of contract renegotiation and redetermination provisions but reasonably concluded this risk was out-weighed by the known savings to be achieved by the project.

The Commission was also fully warranted in finding that the adequacy of the supply of Canadian gas underlying the project was factually supported and that new imports of natural gas, particularly through an existing, not fully utilized pipeline, should not be denied simply because of the unlikely eventuality that the Canadian government might cut off the requisite supplies for which it has given formal export approvals. Similarly, the Commission reasonably concluded that any possible detriment to the domestic petroleum industry was outweighed by the benefits to consumers to be derived from this particular importation, which permits a more economical use to be made of the PGT pipeline.

While petitioners, in challenging the foregoing Commission determination, contend that the Commission improperly ignored certain facts or considerations, their various contentions, however phrased, are in fact no more

than an attempt to have this Court substitute its policy judgments and evaluations of the facts for those of the Federal Power Commission. This, of course, the Court cannot do.

ARGUMENT

I. The Commission Reasonably Concluded That a Market Exists for the Increased Deliveries Certificated Here

Both the California producers (Br. pp. 5-23) and TIPRO (Br. pp. 13-15) challenge the Commission's factual determination that a market exists for the additional gas sales by Pacific Gas Transmission to PG&E. The Commission's finding is fully supported by substantial evidence.

The record in this case clearly shows not only that PG&E has a rapidly expanding market but that this market, on an annual or average day basis, is by no means saturated by the addition of the supply here at issue. PG&E's forecast of its anticipated average daily requirements, which has not been challenged, is substantially higher than the gas supply it expected to have available even with the 200,000 Mcf increment authorized here. For example, for 1968, the first full year in which the full 200,000 Mcf of gas would be supplied, the estimated market was 2,467,000 Mcf per day, while the estimated supply was only 2,107,700 Mcf, including the new supply (R. 2392, 2400, 4920). Similarly, for 1967, when the first 100,000 Mcf increment was to be made available, PG&E forecast a daily market of 2,336,000 Mcf compared to an expected supply of only 2,095,700 Mcf per day, including the new supply (R. 2392, 2400). In this respect it should be understood that a substantial portion of PG&E's market, like that of most major distributors, consists of interruptible loads for industrial and steam electric uses. Thus, the estimate for 1968 was that 1,479,000 Mcf of the total average daily sales of 2,467,000 Mcf would be sold on an interruptible basis (R. 2400), with the expectation that the interruptible purchasers

would, if necessary, either shut down their operations for short periods or use fuel oil (which is more costly than gas in the PG&E area, R. 1627), as an alternative energy source, particularly for generating electricity.

The California producers, while not challenging PG&E's market estimates, argue at great length (Br. pp. 5-23) that the estimates presented by PG&E as to the supply of gas available from producers in California are much too low and that accordingly the market for the new gas exists here only because PG&E plans to take reduced amounts of gas from California producers. In making this argument, the producers totally ignore the fact that the record shows that, even with the purchases certificated here, PG&E's requirements are such that it could absorb much larger gas supplies from California sources than it estimated would be available—*e.g.*, 241,000 Mcf per day in 1967, 360,000 Mcf per day in 1968, and 650,000 Mcf per day by 1970 (R. 2392, 2400, 4920). In this respect, as the Examiner found (R. 4919-4920), PG&E made it clear that it has consistently made a market for California produced gas as it becomes available and that it expects to continue to purchase all available California gas. Thus, the Examiner found that (R. 4922-4923):

> From all the testimony it is clear that PG&E will not only require all of the usable California gas available but also the volumes here sought to be imported to meet its reasonably anticipated future supply requirements. * * * [Footnote omitted.]

Similarly, the Commission concluded (R. 5260) that there "appears to be little doubt that California will absorb all the gas which producers in California can make available to pipelines there."

The California producers' statement (Br. p. 7) that the only way PG&E can justify the additional importation by November 1966 was by relying on a cut-back on California purchases simply ignores these findings and the record. Indeed, even if PG&E could purchase the same quantities of California gas in 1967 as it had in

1964, PG&E's total supply would only be increased by 103,000 Mcf so that the total supply would still, on an average day basis, be 138,000 Mcf less than the anticipated market potential (R. 2390, 2392, 2400). In these circumstances, the Commission had no occasion to address itself to the attack on PG&E's method for predicting available California gas supplies. The California producers' challenge of that method is thus irrelevant and will not be discussed.

TIPRO's attack (Br. pp. 13-15) on the existence of a market is equally misconceived and completely fails to distinguish between peak day and average day requirements. As we have just discussed, the record fully supports the finding that PG&E will be able to market the additional supplies of gas and even more as soon as deliveries commence. The existence of a market for this gas is, contrary to TIPRO's suggestion (Br. pp. 13-14), in no way inconsistent with the fact that PG&E anticipates the ability to meet 100% of the requirements of its "interruptible industrial" requirements through 1969, if it has the additional Canadian supplies certificated here. TIPRO in its brief implies that, therefore, PG&E would be able to meet its entire interruptible requirements and has no need for more gas. But TIPRO fails to recognize that PG&E's interruptible requirements were divided into two basic categories in the exhibits and testimony presented in this case—namely, "industrial" and "company" uses (the latter principally for use in PG&E steam electric generating plants)—so that the non-curtailment of "the industrial interruptible requirements" which did not include PG&E's own uses tells only a very limited portion of the story. Indeed, the record shows that the requirements of PG&E's steam electric plants constitute more than half of the anticipated total interruptible requirements (R. 2401). Unlike the "industrial interruptible" situation, PG&E, even with the additional Canadian supplies here certificated, expected to be able to meet only about 68% of its own annual steam electric requirement in 1966, 69% in 1967, 57% in 1968, 43% in 1969, and

27% in 1970 (R. 1196, 2401).[5] These figures plainly confirm the existence of a market for the newly certificated supply from Canada. TIPRO also states (Br. p. 14) that one of the applicant's witnesses admitted that there would be no deficiency in PG&E's supplies before the winter 1968-69, citing R. 1162. TIPRO fails to point out that the statement referred to relates only to peak day firm demands (R. 1161-1162, 2403) and not to PG&E's overall market requirements.

Finally, we suggest that TIPRO's argument that a market was not shown to exist is inconsistent with its basic position that Texas gas, rather than Canadian gas, should be used to meet PG&E's present market needs.

II. The Commission Reasonably Concluded That No Alternate Supply Was Available at Better Prices or Conditions for the California Market Proposed to Be Served

All of the petitioners contend (Texas Br. pp. 17-33; TIPRO Br. pp. 6-13; Calif. Prod. Br. pp. 23-26) that the Commission did not adequately consider the possibility of supplying PG&E's growing gas market with gas from domestic sources. Principally, it is contended that lower priced gas could have been obtained by PG&E from El Paso Natural Gas Company, even though that company, an intervenor in this case before the Commission, did not itself make such a claim or even seek to supply the gas.[6]

The Commission reasonably concluded (R. 5259) that "the record in this case does not demonstrate that alternative methods exist for providing the needed volumes of additional gas at rates and under conditions more ad-

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[5] Viewing PG&E's interruptible load on an overall basis, PG&E expected to meet 83% of its entire interruptible load in 1966, 84% in 1967, 77% in 1968, 70% in 1969, and 60% in 1970 (R. 2401).

[6] The California producers alone also seem to suggest that Transwestern Pipe Line Company, which does not now sell to PG&E and made no request to supply PG&E's additional needs, might have been the source of a cheaper alternative supply.

vantageous than those which will be achieved by certification of PGT's instant application." Petitioners' claims that this finding is invalid because certain evidence excluded by the Examiner would show a more advantageous supply is not supported by that evidence, which was, in fact, before the Commission through offers of proof (R. 2920-3036). The Texas argument that the Commission's consideration of evidence as submitted through offers of proof is insufficient to protect the party making the offer because there is no cross-examination is a startling theory. Plainly there is no valid objection if the Commission accepts proffered evidence at face value. Cf. *F.P.C.* v. *Natural Gas Pipe Line Co.,* 315 U.S. 575, 584.

Before discussing petitioners' alleged better alternatives, it is necessary to review the service proposed by PGT. PGT proposed to deliver to PG&E on a *firm* basis an additional 200,000 Mcf of gas per day. It would do so by use of an existing pipeline, essentially adding only compressor facilities. Because this increase in deliveries to PG&E of nearly 50% was to be accomplished by an increased facilities' cost of only about 10% (R. 4919),[7] the unit cost to PGT of delivering its gas to PG&E would be decreased and would automatically be reflected in lower rates to PG&E which purchases this gas under a cost-of-service tariff. The incremental cost to PG&E of the additional 200,000 Mcf was estimated to be 22.6¢ in 1968, 23.36¢ in 1969, and 23.6¢ in 1970 (R. 4916). Furthermore, the reduced cost of service would result in lower rates for the transportation service rendered to El Paso in its Northwest Division. El Paso pays for this service by PGT under a cost of service tariff which, like the rate to PG&E, will be reduced by this expanded use of the PGT pipeline (R. 4917).

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[7] This relates to the cost of both American and Canadian facilities. Contrary to the statement in the Texas brief (p. 14), the cost of Canadian facilities and the effect on north-of-the-border rates appear in the record (R. 678, 819, 1051-1052, 2412, 2414-2416).

As petitioners recognize in urging that better alternatives were available, the incremental cost of PG&E provides an appropriate basis for comparison. But their claims that alternative supplies were available at a better price and on better terms is completely unsubstantiated and demonstrably incorrect.

A. *The Incremental Cost to PG&E For El Paso Gas Under the Hunsaker Testimony Would Be Higher*

The principal alternative source of supply which petitioners claim the Commission did not adequately consider involved an expansion of El Paso's facilities such as that described by Barry Hunsaker, Chief Pipeline Engineer for El Paso Natural Gas Company, in the so-called *Gulf Pacific* hearings involving competitive applications of Gulf Pacific Pipeline Company, Transwestern Pipeline Company, and El Paso to supply increased demands in *southern California.* See *Transwestern Pipeline Co., et al.,* CP63-204, *et al.,* Opinion 500, July 26, 1966,[8] rehearing denied, Opinion 500-A, December 9, 1966.

The Hunsaker testimony relied upon relates to a method by which El Paso could deliver an additional 325,000 Mcf[9] of gas per day to California above the 250,000 Mcf expansion which El Paso was seeking to have certificated. The Hunsaker testimony in *Gulf Pacific* offered here does not, contrary to the statements of petitioners, discuss the rates at which El Paso proposed to sell its additional supplies. Nor did any other evidence introduced or proffered in this case. Nevertheless, the Commission was fully aware of the price at which El Paso proposed to sell gas if its expansion proposals were approved. Not only was the *Gulf Pacific* case also pending before the Commission when this case was before it, but, in any event, PGT pointed out to the Commission (R. 5220) that *El*

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[8] Copies of this opinion of the Commission are being lodged with the Clerk for the convenience of the Court.

[9] California producer brief (p. 24) mistakenly states that the testimony proffered related to the original 250,000 Mcf.

Paso proposed to reduce its rates to an average of 27.75¢ per Mcf, assuming a 1¢ per Mcf reduction in purchased gas costs resulting from the *Permian Basin Area Rate* case,[10] if it were certificated to sell the additional 325,000 Mcf, as well as its originally proposed 250,000 Mcf. More specifically, the record in the *Gulf Pacific* case showed that El Paso proposed to reduce its overall rates by up to ¾¢ per Mcf [11] if its basic 250,000 Mcf expansion was authorized, which it now has been. See *Transwestern Pipeline Co., et al.*, CP63-204, *et al.*, Opinion 500, mimeo p. 4.[12] It also indicated that it could reduce its rates by an additional ¼¢ per Mcf if it undertook the 325,000 Mcf expansion discussed by Mr. Hunsaker, this ¼¢ reduction taking effect once all the new facilities were used to sell 500,000 Mcf. *Id.* at p. 4. In the *Gulf Pacific* case, the Commission did not consider the additional 325,000 Mcf warranted. Assuming, *arguendo,* that a 325,000 Mcf expansion had been undertaken for sales to PG&E and assuming that a ¼¢ reduction would still result even though there was a different purchaser and only 200,000 Mcf,[13] in addition to the 250,000 Mcf for southern California, were sold, the incremental cost to PG&E of this additional 200,000 Mcf would, at the very least, be at least 25.7¢ per Mcf—substantially more than the incremental cost to PG&E of 22.6¢ to 23.6¢ per Mcf for the new PGT gas.[14]

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[10] *Area Rate Proceeding (Permian Basin)* 34 FPC 159, remanded for further proceedings *sub nom. Skelly Oil Co., et al.* v. *F.P.C.*, CA10 Nos. 8385, *et al.*, January 20, 1967.

[11] El Paso's offer, which was separate from and in addition to any *Permian* rate reductions, was made upon the assumption that its unit purchased gas costs shown in the *Gulf Pacific* proceeding would not have increased by the time its expanded service permitting the rate reduction went into effect.

[12] This reduction will redound to the benefit of all of El Paso's customers, not just those receiving additional gas.

[13] There is no indication that any of this ¼¢ rate reduction would be forthcoming if only 200,000 additional Mcf were supplied.

[14] In certificating El Paso's proposal, the Commission has indicated that El Paso should reduce its rates further than it had proposed,

Petitioners' claims (Texas Br. p. 21; Calif. Prod. Br. pp. 28-29) that an additional *firm* supply of 200,000 Mcf per day could be purchased from El Paso at 22¢ per Mcf are misconceived. Texas (Br. p. 21)[15] relies on a statement on cross-examination by one of PGT's witnesses that the incremental cost of gas from El Paso would be 22¢. As the Commission was advised (R. 5220), this reference was plainly taken out of context by Texas. For while the witness did talk in terms of an incremental cost (R. 1221), he was not discussing the incremental cost of a new supply. The full cross-examination shows that he was being asked to explain why his projections of gas to be purchased by PG&E from PGT and El Paso for the period from 1965 through 1970 showed purchases from PGT (Canadian gas) at 100% load factor[16] while gas from El Paso, which did not include any new firm supply, would be purchased at somewhat lower load factors (R. 1221, 2399). The witness explained this difference in load factors on the ground that the incremental cost to PG&E of El Paso gas would be about 4¢ *more* than the incremental cost of Canadian gas. Clearly, the 22¢ in-

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to reflect a lower rate of return and the flow through of liberalized depreciation. Taking these additional factors into account, we estimate that El Paso's rates might on this basis be reduced to as low as an average of 27¢ per Mcf at 14.73 psia. If El Paso gas were substituted for the 200,000 Mcf supply from PGT, this would mean, on these assumptions, that in 1968 PG&E would be purchasing 1,229,000 Mcf per day from El Paso at 27¢, instead of 1,029,000 Mcf at 27.25¢ (R. 4920). (If the additional gas is not obtained from El Paso, there would be no ¼¢ reduction resulting from the 325,000 Mcf increment, though PG&E will still have lower rates from El Paso as the result of the increased sales to southern California.) The difference in the total costs of the two supplies would be the incremental cost to PG&E of an additional 200,000 Mcf from El Paso, which is on an average basis 25.7¢ per Mcf (the total savings to PG&E produced by the ¼¢ per Mcf reduction in the rate paid for present purchases from El Paso is attributed to the additional purchase of 200,000 Mcf in the calculation of incremental cost of the additional supply).

[15] See also TIPRO Br. pp. 11-12.

[16] Load factor is determined by dividing average day sales by peak day sales.

cremental cost mentioned in the course of this explanation (R. 1221) was a reference to the approximate commodity component of El Paso's two-part rate (composed of demand and commodity components) (R. 3091)[17] and reflects the cost of gas purchased by PG&E from El Paso above the 91% annual minimum commodity obligation (R. 3080), since PG&E would in any event be required to pay a minimum bill reflecting the demand charges and commodity charges for 91% of gas it is contractually entitled to receive (R. 3091-3092). The invalidity of the Texas suggestion that this witness' reference to a 22¢ "incremental cost" is comparable to the total incremental cost of 22.6¢ to PG&E of the additional 200,000 Mcf of Canadian gas is further emphasized by that witness' own comparison of the 22¢ price for El Paso supplies with an 18¢ price for Canadian supplies.

The California producers (Br. pp. 27-29, App. C) make an equally unfounded assertion that PG&E could have obtained a new firm supply of 200,000 Mcf per day from El Paso at an incremental cost lower than its incremental cost of the PGT gas. In arguing (Calif. Prod. Br. p. 29) that the possibility of alternative supplies from El Paso at prices from 20½¢ to 22½¢ existed and should have been analyzed in greater detail, this petitioner relies on patently irrelevant figures.

Thus, the producers first suggest that the new supplies sought by PG&E could be purchased from El Paso under its Excess Gas Service Rate Schedule at 21.22¢ per Mcf.[18] But the proposed 21.22¢ rate under the Excess Gas Service rate schedule is not available for the additional *firm* supply sought by PG&E since that rate schedule by its terms provides for an *interruptible* service, available only when other California customers of El Paso do not take their maximum contracted daily demand (R. 3094).

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[17] El Paso commodity rate is 22.48¢ at 14.9 psia, which is equivalent to 22.22¢ at 14.73 psia, the pressure used in this case.

[18] The tariff referred to provides for a 22.22¢ rate at 14.73 psia. The figure used by petitioner apparently assumes a 1¢ reduction for purchased gas costs on the basis of the Commission's *Permian* decision.

The California producers (Br. p. 29) also mistakenly assert that a memorandum prepared by PG&E's witness Moulton in another connection shows that an alternative supply of gas could be purchased from El Paso at between 20½¢-22½¢ per Mcf. The memorandum (R. 3061) shows on its face that costs referred to are the average costs per Mcf *to El Paso* of its expansion proposals in the *Gulf Pacific* case.[19] But El Paso's incremental cost is very different from the incremental costs of its purchasers. For El Paso sells gas under a tariff which provides the same rates for all firm customers in California. When, as in the *Gulf Pacific* case, El Paso's incremental cost of a new supply is less than the average cost of its existing supply, the result is an overall cost decrease with a consequent reduction in the rates to all customers. Since El Paso sells to more than one purchaser, this means that the benefits of a low cost expansion will be passed on to all its customers. And even if only one is purchasing the entire incremental supply, it will not get the entire cost saving but will have to share it with the other customers. Indeed, as we have indicated, El Paso's expansion for the purpose of increasing its service to southern California will also reduce the rates paid by PG&E.[20]

Finally, it should be noted that while the Commission accepted the Texas-TIPRO view that there would have been sufficient gas supplies in the Permian Basin and other areas in the southwest to meet the present expansion (R. 5260), it was also correct in pointing out that the facilities for bringing the desired amounts of gas to

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[19] This is confirmed on examination of portions of the record in the *Gulf Pacific* case to which the memorandum refers.

[20] Concededly, if a new purchase does precipitate overall lower costs, it is reasonable to assume that all the reduced costs to *that* purchaser should be attributed to the new purchase. As we have shown, *supra*, pp. 14-5, n. 14, the incremental cost to PG&E of such a supply from El Paso would at the minimum be 25.7¢ or more than two cents higher than the incremental cost to PG&E of purchasing Canadian gas. But there is absolutely no basis for treating a seller's incremental cost as reflecting the purchaser's incremental cost when the cost savings are distributed among a number of purchasers.

California were not available and could not be for some time. Pertinent to this is the fact that El Paso had not requested authorization to sell PG&E the needed supplies. Even without such an application, the Commission could have rejected or deferred approval of PGT's import proposal if it believed a better means of meeting PG&E's needs could be made available by another means. See *El Paso Natural Gas Co.*, 30 FPC 77 (known as the *Rock Springs* case). While the Commission has no power to require a pipeline to enlarge its facilities, we have no doubt that the aggressive companies serving the California market would take any reasonable opportunity to avail themselves of such an opportunity if the Commission indicated its preference for service by a different company. But assuming, *arguendo,* that the Commission, instead of approving PGT's proposal by its June 15, 1966, order, had issued an order that same date suggesting that El Paso submit an alternative proposal, any such certificate application could have been authorized only after new hearings. Since the California producers contend that no out-of-state gas is needed by PG&E, a thoroughly contested hearing would have been indicated, even assuming no other opposition, with the result the Commission approval in less than a year or year and a half would have been most unlikely.[21] Plainly, any supply from El Paso could not have come on the line by November 1, 1966, when PGT's additional deliveries were to commence.

Since the Commission reasonably found the existence of a present market requirement for PGT's additional 200,000 Mcf per day supply, the non-existence of a competing application from El Paso and the consequent delay in attaching supplies from such a source plainly indicate

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[21] For example, following the denial of El Paso's application in the *Rock Springs* case, *supra*, on July 12, 1963, it was not until July 26, 1966, as a result of the comparative *Gulf Pacific* proceedings, that the Commission issued its order granting new applications to serve southern California.

that the use of El Paso facilities would not have been a true alternative for the PGT proposal even if, contrary to the facts, it were competitive on a price basis.

B. *California Producer Claims of Other Alternatives Are Totally Misconceived*

The California producers' suggestion (Br. pp. 28-9) that the Commission should have held that purchases under Transwestern's limited Excess Rate Schedule at 20¢ constituted a viable alternative is absurd. The Transwestern rate schedule (R. 3110) to which the producers refer is by its terms available only to customers purchasing under the Contract Demand Service Rate Schedule (R. 3107). PG&E does not make any purchases from Transwestern, which has committed the entire potential of its California pipeline capacity to the Pacific Lighting companies, serving southern California (*e.g.*, R. 3102-3106). Moreover, the full cheap expansibility of Transwestern's line to California has now been certificated for sales to the Pacific Lighting companies in the *Gulf Pacific* case.[22] *Transwestern Pipeline Co., et al.*, CP63-204, *et al.*, Opinion 500, July 26, 1966.

The *Gulf Pacific* case shows that the California border price for Transwestern gas at a 100% load factor would be reduced to 33.2¢ per Mcf, less some reduction indicated in the opinion, once the line is fully utilized. No suggestion has been advanced either in this case or in *Gulf Pacific* that Transwestern could achieve any additional low cost expansion by use of its existing line. Hence the unit cost of any additional Transwestern supply probably would be at least the average cost of its fully utilized line—*i.e.*, in excess of 30¢—or more. In any event, even if the Transwestern expansion had not been approved in the *Gulf Pacific* case, it is apparent that PG&E could only purchase a firm supply from Transwestern at the same overall rates that are to be charged

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[22] This type of cheap expansibility is precisely the type of expansion authorized for PGT in this case.

the Pacific Lighting companies, *i.e.*, more than 30¢. In these circumstances, the suggestion of the California producers that Transwestern could provide a meaningful alternative supply to the PGT gas for which PG&E has an incremental cost of from 22.6¢ to 23.6¢ was completely unreal.

The California producers also urge (Br. pp. 24-27) that additional supplies of El Paso gas are available to PG&E without the need for the construction of any new facilities and that the Commission did not adequately consider this alternative. While these producers made this contention in their exceptions to the Examiner's decision (R. 5070-5072), they did not repeat it in their application for rehearing and hence this objection may not be considered by the Court. See Section 19(b) of the Natural Gas Act, *infra*, p. 34; *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 649; *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137, 157; *Wisconsin* v. *F.P.C.*, 373 U.S. 294, 307. In any event, the suggestion that because El Paso has on some days of a year supplied substantial volumes over its contractual commitment to both PG&E and the Pacific Lighting system, El Paso can therefore make the entire 200,000 Mcf sale to PG&E "at no additional cost" is without basis. The figures to which these producers refer were supplied by El Paso, through its counsel. When he furnished the data he explained that the system capacity to deliver this "best efforts" gas was limited and was not an average daily available capacity since the ability to deliver to California depended on the requirements of El Paso's customers east of California, so that especially on cold winter days the California delivery capacity would be restricted to El Paso's existing firm commitments (R. 1377). Moreover, the basis for the assumption that all excess amounts could be sold to PG&E and none to the Pacific Lighting system is not apparent since both purchasers would seem to have call on such excesses. Plain-

ly, this was not a viable alternative for the firm 20-year supply certificated here.

C. *The Commission Reasonably Authorized the PGT Importation Without Requiring Modification of the Canadian Gas Producer Contracts*

In addition to the erroneous claim that Texas gas could be delivered to PG&E at a cheaper price than the incremental cost to PG&E of the additional 200,000 Mcf from Pacific Gas Transmission, petitioners also suggest (TIPRO Br. pp. 9-11, 12-13; Texas Br. pp. 14-16, 20-21) that the domestic supplies would provide a better alternative because the producers' sales in Canada are not subject to F.P.C. regulation and particularly because many of the sales contracts permitted unlimited price renegotiations or redeterminations in 1968 and five-year intervals thereafter.

It is stated that, by contrast, gas sold in Texas is subject to Commission regulation "in such a manner that its price is firm and definite in each field or area" (Texas Br. pp. 20-21). While the existence of indefinite price-changing provisions in some of the Canadian contracts undoubtedly leaves an element of uncertainty as to future prices, it is also not possible to predict with certainty the prices that may be charged for Texas gas over the next twenty years. The statement in the Texas brief (pp. 20-21) as to the complete firmness of domestic prices is not correct either in contractual or regulatory terms. Contractually, as this Court knows from *Superior Oil Co.* v. *F.P.C.*, 322 F. 2d 601, certiorari denied, 377 U.S. 922,[23] the Commission has limited the type of price-changing provisions that could be included in producer contracts. But these regulations did not, as implied, call for firm 20-year prices; instead they permit fixed periodic increases without restrictions as to the amounts, as well as price redeterminations or renegotiations every five years, subject to a ceiling of prices

[23] See also *F.P.C.* v. *Texaco Inc.*, 377 U.S. 33.

in the same area previously approved by the Commission, and provisions permitting changes up to applicable just and reasonable area rates approved by the Commission. See Section 154.93 of the Commission's regulations, 18 C.F.R. 154.93, as amended by 31 Fed. Reg. 15485 (December 8, 1966), *infra*, p. 36.[24] Contractually authorized prices in interstate sales by domestic producers may, of course, be collected and retained only if they are authorized by the Commission under its rate regulatory authority.

With respect to sales from the Permian Basin area, the Commission has now determined the maximum just and reasonable rates for the area. See *Area Rate Proceeding (Permian Basin),* 34 FPC 159, remanded for further proceedings *sub nom. Skelly Oil Co., et al.* v. *F.P.C.,* CA10 Nos. 8385, *et al.,* January 20, 1967. In that case, the Commission also imposed a moratorium on the filing of increased rates prior to January 1, 1968. But, thereafter the producers, if contractually free to do so, will be able to file for increased rates and, after a maximum of six months, to place such increased rates into effect, subject to refund. Without attempting to speculate on the future course of producer prices in the United States or in the Permian Basin area, it cannot be assumed flatly that they will remain unchanged beyond 1968.

In any event, the Commission, in considering the arguments relating to the Canadian gas supply contracts, recognized that many of the contracts underlying the applicant's expansion proposal contained provisions permitting price renegotiations and price redeterminations based on the weighted average field price paid by the purchaser and hence that there was an element of uncertainty about future prices. It concluded, however, that the contingency of unknown price increases sometime in the future was

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[24] A similar limitation on Canadian clauses would obviously not be possible. While the Commission could refuse to approve any project based on contracts including any indefinite price changing provisions, this would be more restrictive contractually than the treatment of domestic producers.

out-weighed by the immediate savings to American consumers when the proposed sales commence (R. 5261). In discussing this problem and the potential impact of the uncertainty, the Commission pointed out that while 98% of the gas supply underlying Pacific Gas Transmission's project approved in 1960 was based on contracts containing such indefinite price-changing clauses, 54% of the reserves supporting the proposed expansion were acquired under contracts without such escalation provisions (R. 5260-61, 460-466).[25] The remaining 46% of the expansion supply was acquired by extensions to existing contracts to cover reserves added by additional development in already dedicated fields. In view of the willingness of producers to forego indefinite escalation clauses in new contracts, without any higher fixed prices, the Commission reasonably concluded (R. 5261) that the more recent contracting practices would have a retarding effect on any price escalation under indefinite pricing clauses since either the price paid by the purchaser or the market price in the area would presumably be the standard under those clauses.[26]

In view of the speculative nature of any future price escalations under the indefinite price-changing provisions

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[25] TIPRO challenges (Br. pp. 10-11) the finding that the new or Form D contracts underlying the additional supply do not contain renegotiation clauses on the ground that some Type D contracts did have renegotiation clauses. The witness explained in this respect (R. 353-354) that *only* four Type D contracts, those relating to Wilson Creek Field, had renegotiation provisions in them. (These four contracts represent less than 2% of the total reserves (R. 1976).) While the percentage of contracts without price renegotiations might be slightly changed on this basis, the basic conclusion that substantial amounts of new gas are purchased without such clauses is not affected.

[26] The examiner pointed out, in his detailed discussion of this point (R. 4910-4916), that applicant's witness on Canadian gas supply did not anticipate early increases under the price renegotiation clause (R. 365-368), while a producer witness for TIPRO testified in rebuttal that, in his view, the renegotiation clauses would inevitably result in prices in excess of the fixed escalations, though no price level could be predicted.

in Canadian gas purchase contracts, the Commission was certainly warranted in concluding that the immediate American consumer savings should be given greater weight than the mere possibility of price increases in the future. The full utilization of Pacific Gas Transmission's facilities will by 1968 decrease the unit cost of all the gas delivered by Pacific Gas Transmission to PG&E by more than 3½ cents per Mcf and will reduce the charge to El Paso for the gas Pacific Gas Transmission transports for it from the Canadian border to points in the Pacific Northwest States (R. 4916-4917, 5260).[27] And, as the Commission explained (R. 5261), acceptance of the proposal that the expansion authorization be conditioned upon the renegotiation of the supply contracts to eliminate price escalation provisions would unnecessarily have risked a delay in effecting these savings.

III. The Commission Reasonably Found That PGT Has an Adequate Supply of Gas to Render the Expanded Service Here Approved

Texas plainly errs in contending (Br. pp. 9-13) that the Commission did not consider either the adequacy or the reliability of the gas supply underlying Pacific Gas Transmission's proposal to deliver an additional 200,000 Mcf per day to PG&E. There is also no substance to the related claim that, in any event, the Commission's supply findings are not supported.

The Commission expressly found (R. 5262) that "Pacific Gas Transmission Company has an adequate supply of natural gas committed to it which will enable it to render the service herein authorized" having explained (R. 5259-5260):

> The arguments that have been made as to the inadequacy of the Canadian gas supplies, while they

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[27] The savings for El Paso were estimated at $2,494,000 during the period 1966-1970.

> would be relevant to a determination of whether a new pipeline should be built, are not appropriate where existing pipeline facilities will be utilized to make delivery of the gas. Even if the Canadian supplies were shown to be too small to justify the construction of a new pipeline, it would seem desirable to allow already existing facilities to be used to bring out whatever gas may be available. In addition we think that there has been no showing that the Canadian supplies are inadequate. We considered this question before authorizing the construction of these pipeline facilities. We then determined that the sources of supply were sufficient to justify construction of facilities which, with relatively little additional construction, would have capacity to carry all present and proposed gas imports. Nothing has been presented here which would persuade us that our prior determination was erroneous.
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> The suggestion is made that the Canadian supplies may be cut off and are therefore unreliable. We think that the close relationship between the United States and Canada renders it unlikely that this sort of difficulty will arise. Also, this is an argument more properly advanced at the time of an application to construct new pipeline facilities. That a supply may be cut off in the future is not an argument against using existing facilities to bring out gas up to the time any cut-off occurs, although it may be an argument against investing in new facilities.

Also pertinent is the Examiner's discussion of the adequacy of the Canadian gas supply (R. 4908-4910), exceptions to which the Commission denied.

It is apparent that the Commission did not consider the question of gas supply irrelevant though it did believe that the contentions pressed on exceptions were not well taken in the context of a case where no new pipeline was to be built but rather only limited facilities were to be installed to take advantage of the cheap expansibility of an existing pipeline.

We now take up Texas' specific objection. First it argues (Texas Br. p. 9) that the record shows a physical insufficiency of natural gas because not all the wells ultimately required to *deliver* the committed reserves have been drilled. Texas argues that because additional wells will be needed in the future to achieve maximum deliverability from known reserves, the supply adequacy has not been shown. The need for such additional developmental wells to carry out long-term commitments exists in almost every case where large, new supplies are being attached. Texas' suggestion that the Commission should not issue any gas sales certificate until the producers have drilled every well that may eventually be needed is, we suggest, an astounding one and without any support. Neither of the producer groups of petitioners has joined in this contention.

Texas also makes the factual claim that this expansion should not have been approved because there is allegedly no showing that the Canadian producers could meet the peaking requirement, as opposed to the average daily requirement. In this respect Texas relies (Br. p. 9) on a statement (R. 206) by one of applicant's witnesses that he had made no computation as to the maximum deliverability of the wells used in making his deliverability study. But Texas neglects to recognize this was said in the context that these wells could deliver more than that shown on his study and that his schedule only showed deliverability to the extent needed, not the maximum capabilities above the amounts needed (R. 206). He also indicated that his study which showed the capability of the wells to deliver the annual requirements took into account the deviations in deliveries from the average daily amount (R. 210-218). The record also indicated that Alberta and Southern's gas purchases in Canada were usually fairly close to their average requirements (R. 342) and that Pacific Gas Transmission's maximum annual contract obligation is 365 times its daily contract demand (615,000 Mcf by November 1967), not 365 times

the maximum daily demand (665,000 Mcf by November 1967) (R. 4183).

It may also be noted that the 681,900 Mcf average daily requirement of Alberta and Southern (which purchases the gas for the importation) used for the first full year of the expansion was considerably in excess of the 665,000 Mcf average daily contract commitment of Alberta and Southern, though less than the maximum daily commitment of 720,000 Mcf (R. 4909). But maximum demands are not taken on a constant basis and could not be so taken contractually.[28] In view of these circumstances, it seems that the use of a total requirement of 681,900 Mcf per day was consistent with the over-all commitment of Alberta and Southern. Certainly, the Commission was free to so conclude and to reject the Texas objections to the Examiner's finding that there was an adequate gas supply.

The principal claim of Texas with respect to the inadequacy of the Canadian gas supply apparently is that the United States should not rely on gas supply from foreign sources because that supply might be cut off by the Canadian government sometime in the future (Texas Br. pp. 10-12). In support of its allegations as to the unreliability of Canadian supplies it points (Br. p. 11) to the action of the Canadian government with respect to a proposal by the Great Lakes Transmission Company to construct pipeline facilities through the United States. In that proceeding, requests for approval of the project were pending concurrently before the Federal Power Commission and the Canadian National Energy Board. Though the National Energy Board recommended approval for the proposal, the Canadian government, in exercising its normal review, initially did not consider the proposal within the interest of Canada. As Texas notes, the basic project has now received Canadian approval, though it is still pending before the Commission. That

[28] It was also testified that the committed reserves had increased above those shown by the studies used to support the application (*e.g.*, R. 342-343).

case shows that an international project is closely scrutinized in Canada, as well as in the United States, before final long-range commitments are made. But the fact that the Canadian government, like the Federal Power Commission, might view a *proposed* project inconsistent with its own national interest (because it originally appeared to downgrade Canadian pipeline facilities), gives no support to the Texas fear that Canada might cavalierly cut off the gas supply for a project built and operated after *final* Canadian governmental approval, as here (R. 2417-2426). The Commission's belief (R. 5260) that "the close relationship between the United States and Canada renders it unlikely that this sort of difficulty will arise" is, we submit, a reasonable exercise of the judgment entrusted to it for determining whether to approve the import of natural gas.

Finally, contrary to petitioners' assertion, the Commission was fully warranted in treating as relevant the fact that the applications here did not involve the construction of an entirely new pipeline project but instead involved a relatively small capital investment permitting more efficient utilization of the existing pipeline with lower rates to PGT's customers. And if there were risks of a supply cut off, these exist not only with respect to the new service but also to the existing service approved in 1960. 24 FPC 134. The Commission approved the initial more expensive construction and importation by PGT with the realization that the project would render the most efficient service only after additional gas supplies were added. At this time the Commission should certainly be most reluctant to deny an expansion, which is shown to lower domestic rates by more efficient utilization of existing facilities, solely on the ground that imports are *per se* undesirable because of a latent possibility that the Canadian government might someday act unreasonably.

IV. The Contentions That the Commission Did Not Consider the Effects of the Approved Imports on the Domestic Economy Are Baseless

Texas (Br. pp. 37-39) and the amicus Independent Petroleum Association of America also contend that the Commission did not consider various effects of this importation on the domestic economy. This is not the case.

Most, though not all of the arguments advanced here, were also addressed to the Commission. After noting (R. 5259) that opponents of the increased importation "urge that as a matter of policy the importation of gas should be restricted" and that "[i]t is urged that the importation of natural gas has a depressing effect on the domestic industry, especially domestic exploration," the Commission expressed its position (R. 5260):

> The Commission will consider carefully in every case the effect of importations of natural gas upon the domestic industry and upon the exploration and development which may be needed to develop future gas supplies. In the circumstances of the present case, where the need of the market for additional gas is established, where the basic facilities to procure the Canadian gas have already been constructed, where no competing application for transportation and sale from an alternative domestic source has been filed by any pipeline, and where there will be a reduction in unit cost of service which will benefit the consumers of four states, we think the benefits to be derived from granting these applications far exceed any alleged detriments to the domestic petroleum industry or its exploration and development program. * * *

The Commission thus recognized that one element in determining whether the importation of natural gas was consistent with the public interest requirements of Sections 3 and 7 of the Natural Gas Act, *infra*, pp. 32-34, was the effect on the domestic natural gas and petroleum industry. At the same time it viewed the advantages to the gas consumer from this importation to far outweigh

any such possible detriments. The Commission's view that this judgment must be determined on the facts of each case is certainly reasonable. Moreover, the balancing of competing interests is not susceptible to any mathematical measurement. In these circumstances, petitioners' arguments are no more than an attempt to have this Court substitute its judgment for that of the Commission—plainly not a judicial function.

Finally, we note the Texas argument (Br. pp. 38-39) that the effect of the importation upon the balance of payments situation should have been considered. This consideration was not urged upon the Commission in either the exceptions to the Examiner's decision nor in the applications for rehearing. Accordingly, the contention may not even be considered by this Court. See Section 19(b) and cases cited, *supra*, p. 20. Nevertheless, we wish to point out that the contention has no substance. In the first place, our balance of payments programs have carefully and deliberately avoided restrictions on imports. See Message from the President Relative to Review of International Balance of Payments and Our Gold Position—February 10, 1965, H.R. Doc. No. 83, 89th Cong., 1st Sess. p. 3; *Economic Report of the President* (January, 1966), pp. 13, 14. In addition, there is a balance of payments agreement with Canada which would render import restrictions futile. See, *e.g.*, Message from the President, *supra*, at p. 2. Under this agreement, if the United States cuts imports from Canada, Canadian exports are reduced and the Canadians get less foreign exchange reserves than they would have otherwise. This would then tend to enable Canadians to borrow more on our capital market (*i.e.*, United States investors could buy more long-term Canadian securities), and our balance of payments would be no better off than before.

CONCLUSION

For these reasons, the order of the Commission should be affirmed.

Respectfully submitted,

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January 30, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER H. SCHIFF

Deputy Solicitor

APPENDIX

1. Pertinent provisions of the Natural Gas Act, 15 U.S.C. 717-717w, provide as follows:

> SEC. 3. After six months from the date on which this act takes effect no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.
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> SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural

gas when to do so would impair its ability to render adequate service to its customers.

* * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice

or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * *

SEC. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for re-

hearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

*   *   *   *

2. The pertinent provision of the Regulations under the Natural Gas Act provides as follows:

> Section 154.93, 18 C.F.R. 154.93, as amended, 31 Fed. Reg. 15485:
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> For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:
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> (a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
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> (b) Provisions that change a price to a specific amount at a definite date; and
>
> (b-1) Provisions that permit a change in price to the applicable just and reasonable area ceiling rate which has been, or which may be, prescribed by the Commission for the quality of the gas involved; and
>
> (c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question:

Provided further, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

3. The pertinent provision of the Commission's Rules of Practice and Procedure provides as follows:

Section 1.28(b), 18 C.F.R. 1.28(b):

(b) *Offers of proof.* Any offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

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